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In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado Case Nos. 94SA48 And 94SA128

BRIEF OF AMICI CURIAE STATES IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF AMICI CURIAE

Amici curiae states hold a common view that the ruling and rationale below pose a serious threat to state constitutional provisions, and more generally, to legislation enacted at any level other than local government. As detailed below, the Colorado Supreme Court has announced a fundamental constitutional right of equal group participation in the political process that, if allowed to stand, necessarily disqualifies state constitutions as repositories of important public policies.

Further, the novel theory underlying the ruling conflicts with established priciples of equal protection, thus undermining the stability necessary for states to conduct their public affairs with reasonable confidence.

Amici curiae states join in this brief to focus attention on flaws in the analysis below and to illuminate their negative consequences for state governments.

REASONS FOR GRANTING THE PETITION

I. Summary of Argument

This is a case in which the Supreme Court of Colorado stretched beyond recognition several of this Court's equal protection decisions to create a new fundamental right of breathtaking scope. This case is not one involving suspect classifications. *See, e.g., Hunter v. Erickson,* 393 U.S. 385 (1969). Nor is it about the right to cast a vote for

the candidate of one's choice. *See, e.g., Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968). Nor is it about the dilution of one's vote through the process of assigning voters to unequal districts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964). Respondents seek not the vote, but rather the right to regulate the lives and property of others free of constitutional limitations designed to protect the liberties of those whom they seek to restrict. In other words, Respondents seek (and the Colorado Supreme Court has delivered) a right of any and every "independently identifiable" interest group to have its regulatory agenda insulated by the Equal Protection Clause against the countervailing interests of others.

According to the Colorado Supreme Court, Amendment 2 violates equal protection because it removes one issue favored by an identifiable (but non-suspect) group from the ordinary political process by treating the issue – homosexual and bisexual rights – as a matter of state constitutional law. *Evans v. Romer*, 854 P. 2d 1270 (Colo. 1993) ("*Evans I*"), Pet. App. D-25-26.[1] According to the court, strict scrutiny is triggered under the Equal Protection Clause not because Amendment 2 employs a suspect classification, but because it "singles out and prohibits

[1] *Evans I* affirmed the trial court's issuance of a preliminary injunction against enforcement of Amendment 2. Subsequently, the Colorado Supreme Court reaffirmed the constitutional principles it had articulated in *Evans I* and entered final judgment permanently enjoining enforcement of Amendment 2. *Evans v. Romer*, 94SA48 and 94SA128, (Colo. Oct. 11, 1994) ("*Evans II*") (Pet. App. B).

this [non-suspect] class of persons from seeking governmental action favorable to it and thus, from participating equally in the political process." *Id.* at D-26. Remarkably, this newly discovered group-right of political participation somehow required the court to set aside the results of a voter initiative.

Not only is the court's holding not supported by *Hunter* or any of this Court's other precedents, it directly conflicts with the holding and reasoning of *James v. Valtierra*, 402 U.S. 137 (1971), which explicitly rejected an equal protection claim identical in all material respects to that upheld by the court in this case. *Hunter* and its progeny are not about an Equal Protection Clause at war with popular democracy and state constitutional freedoms. Instead, this important line of cases is inextricably intertwined with the central meaning of equal protection – the protection of racial minorities against laws which place unique burdens upon their ability to enact legislation prohibiting racial discrimination. *Hunter*, 393 U.S. at 391.

The court below erred by applying strict scrutiny to Amendment 2. This erroneous decision has already been followed by one federal district court to set aside a similar ballot initiative passed by voters in Cincinnati, Ohio. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994). The decision also casts a long shadow over numerous provisions of state constitutions which remove issues favored by other "identifiable groups" from the ordinary political process. Accordingly, the issue presented by this case is one of national significance, and review by this Court is clearly warranted.

II. Colorado Amendment 2 Does Not Impair Any Fundamental Right Within The Meaning Of This Court's Equal Protection Caselaw

The trial court rejected Respondents' claim that homosexuals and bisexuals constitute a suspect or quasi-suspect class. Pet. App. C-18-19. Respondents did not appeal that holding, and the Colorado Supreme Court did not base its decision on a suspect or quasi-suspect class rationale. *Evans I* (Pet. App. D-7-8); *Evans II* (Pet. App. B-6 n.3). Thus, in order to trigger strict scrutiny of Amendment 2, it was necessary for Respondents to establish that the amendment creates "inequalities bearing on fundamental rights." *See* Laurence H. Tribe, *American Constitutional Law* § 16-7, at 1454 (2d ed. 1988).

The Colorado Supreme Court stated that the "most explicit, and nuanced, articulation" of the fundamental right issue was contained in a series of decisions, beginning with *Hunter*, in which this Court reviewed "legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters." *Evans I* (Pet. App. D-14). However, the cases relied upon by the court do not support the court's analysis.

In *Hunter*, this Court considered whether an amendment to the Akron, Ohio city charter violated the Equal Protection Clause. The amendment prohibited the City Council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters in a regular or general election. The racially discriminatory impact of this provision was crucial to the Court's rationale. *Hunter*

was a difficult case not because this Court was crafting a sophisticated new right of political participation for any and every identifiable group, but rather because the Court needed to explain how a facially-neutral classification constituted a "meaningful and unjustified official distinction[ ] based on race." *Hunter*, 393 U.S. at 391. In other words, the Court's task in *Hunter* was to point out that, despite its surface neutrality, the charter amendment placed "special burdens on *racial minorities*" concerning their ability to enact legislation prohibiting racial discrimination in housing. *Id.* (emphasis added).

Similarly, in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), this Court invalidated a voter initiative which stipulated that no local school board could require any student to attend a school other than the one located nearest or next nearest to the child's residence. The initiative was facially neutral regarding race, but included a large number of exceptions to the rule which led this Court to conclude it was enacted "because of" not merely "in spite of" its adverse effects upon busing for racial integration. *Id.* at 471. The Court carefully discussed the meaning of *Hunter* and explained why legislation of the kind challenged in that case "falls into an inherently suspect category:"

> [W]hen the political process or the decisionmaking mechanism used to address *racially* conscious legislation – and only such legislation – is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.' "

Id. at 485-86 (quoting *James v. Valtierra*, 402 U.S. at 141 and *Hunter v. Erickson*, 393 U.S. at 391) (emphasis added).

There is no reasonable way to read *Hunter* and *Seattle School District* as supporting the far-reaching fundamental right applied by the court in the case below. Both cases involved this Court's efforts to implement the principle lying at the core of equal protection – the prevention of invidious discrimination on the basis of race.

As Justice Erickson's thoughtful dissent in *Evans I* makes clear, the Colorado Supreme Court's reading of *Hunter* as the source of a broad right of political participation for "identifiable groups" was explicitly discussed and rejected by this Court in *James*. *See Evans I* (Pet. App. D-49-52) (Erickson, J., dissenting). *James* upheld the constitutionality of a California constitutional amendment which provided that no "low rent housing project" could be undertaken by "any state public body" until the project was approved by a majority of the voters at a community election. *James*, 402 U.S. at 139 n.2.

Thus, as in the case of Colorado Amendment 2, the California amendment made it more difficult for an identifiable group (the poor) to enact part of its legislative agenda through the normal political process. Appellees in *James*, a number of low income residents of California, argued that the California amendment constituted "unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage." 402 U.S. at 142. The Court clearly rejected this attack on California's "procedure for democratic decisionmaking." *Id.* at 143. Justice Black's majority opinion in *James* explained the Court's reasoning in terms which reject authoritatively the reasoning of the Colorado Supreme Court in this case:

> But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.

Id. at 142. Since the Court in *James* read *Hunter* as a case involving political burdens on racial minorities (*id.* at 140-41), and since the poor are not a suspect class under the Equal Protection Clause, the Court held that the California amendment could be invalidated "only by extending *Hunter*, and this we decline to do." *Id.* at 141.

Likewise, the Colorado Supreme Court's attempt to read *Gordon v. Lance*, 403 U.S. 1 (1971), as support for an extremely far-reaching right of political participation is misguided. *See Evans I* (Pet. App. D-19-20). In *Gordon*, this Court upheld a West Virginia law that proscribed the state's political subdivisions from incurring bonded indebtedness or raising taxes without the prior approval of 60% of the voters in a referendum. The Court held that unlike the facts of *Hunter*, the West Virginia law did not single out any "discrete and insular minority" for special burdens. 403 U.S. at 5. Therefore, there was no equal protection violation. *Id.* at 7.

The Colorado Supreme Court argued that since the West Virginia laws upheld in *Gordon* "had nothing to do with racial minorities or any other traditionally suspect class, yet the Court felt compelled to discuss *Hunter*," it is clear that *Hunter* "applies to a broad spectrum of discriminatory legislation." *Evans I* (Pet. App. D-19-20). The court attempted to bolster this specious reasoning by

adding the following trivial insight: "If . . . *Hunter* is a 'race' case and nothing more, the Supreme Court could have summarily dismissed the notion that it was applicable in *Gordon*." *Id.* But, of course, this Court in *Gordon* did precisely what *Evans I* said it did not do – it discussed *Hunter* only to distinguish it as a case involving legislation which singled out racial minorities and other suspect classes for unfavorable treatment. *Gordon*, 403 U.S. at 5. Although the West Virginia laws made it more difficult for some political groups to enact their legislative agendas, these laws did not discriminate against any racial or other suspect class and, therefore, did not violate the Equal Protection Clause. *Id.* at 5-7. Thus, *Gordon* is an application – not a repudiation – of the "race only" reading of *Hunter*.

Taken one by one or together, *Hunter, Seattle School District, James*, and *Gordon* do not support a broad right for any and every identifiable group to have its political agenda insulated against the civil liberties of others. Rather, these cases recognize that the central purpose of the Equal Protection Clause is to protect racial and other suspect classes against discriminatory state action. Therefore, laws that interfere with the right of racial and ethnic minorities to participate in the political process are subject to strict scrutiny even if the laws are facially neutral.[2] However, laws that make it more difficult for non-suspect

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[2] *Hunter* and *Seattle School District* are not fundamental rights cases. They merely hold that a law which restricts the ability of a suspect class to participate in the political process employs a suspect classification notwithstanding its facial neutrality.

groups to enact their political agendas, such as the laws upheld in *James* and *Gordon*, do not conflict with equal protection. Since Colorado Amendment 2 falls into the latter category, the court below erred by subjecting the amendment to strict scrutiny.

The Colorado Supreme Court also found support for the fundamental right of political participation in this Court's cases dealing with the right to an equally weighted vote for the candidates of one's choice. *See e.g., Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964). In each of these cases, however, the basis for this Court's decision was the fact that the challenged laws impinged directly on the established and fundamental right to vote. In this case, there is no state-created obstacle to voting or any other aspect of the political process. The right-to-vote cases are not applicable to Amendment 2, and the court below erred by relying upon them as support for its decision.

III. The Fundamental Right of Political Participation Created By The Colorado Supreme Court Is Inconsistent With The Right Of The People To Enact Constitutional Provisions To Protect Civil Liberties

The potential scope of the right recognized by the Colorado Supreme Court in this case is breathtaking. If the court means what it says, it has discovered a constitutional right of any "independently identifiable class of persons" to have its political agenda insulated against normal democratic processes.

The idea animating this remarkable new right appears to be the truism that constitutional law discourages political participation by groups who favor unconstitutional legislation. Thus, homosexuals and bisexuals were discouraged by Colorado Amendment 2, because it made their desire to regulate the businesses and property of others – through enactment of "gay rights" legislation – more difficult to accomplish. Similarly, many religious groups are discouraged from political participation by the Establishment Clause, because it prohibits the enactment of their political preferences for state-financed parochial schools.[3]

Pro-life groups, members of which often share an "independently identifiable" religious and cultural heritage, are discouraged by the unenumerated right of privacy, by state Equal Rights Amendments, and by other provisions of state constitutions protecting reproductive rights, because these provisions prohibit their strong preferences for laws restricting access to abortion services. Organized groups of crime victims are discouraged from political participation by the Fourth, Fifth, Sixth, and Eighth Amendments, and by their counterparts in

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[3] Presumably, the new right of political participation would apply against the federal government under the equal protection component of the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Thus, many provisions of the Bill of Rights may restrict the right of political participation of independently identifiable groups whose favorite issues are removed from the ordinary political process by these constitutional guarantees. The Colorado Supreme Court did not provide any guidelines for resolving the tension between the new fundamental right and the Bill of Rights.

state constitutions, because these civil liberties invalidate laws that violate the rights of defendants in criminal cases.

The list is endless. Constitutional law routinely discourages groups from seeking to legislate political agendas which the constitution has taken out of the hands of legislators. Indeed, one of the purposes of constitutional law undoubtedly is to shelter persons whose liberties are protected by the constitution against political agendas designed to restrict those rights.

The right of political participation created by the Colorado Supreme Court in this case casts a long shadow over the right of the people to protect their freedom by adopting constitutional liberties. Although the Colorado Supreme Court did not define the concept of an "independently identifiable group," it did conclude that it was broad enough to cover non-suspect classes such as homosexuals and bisexuals. *Evans I* (Pet. App. D-25-26). Moreover, while denying that it was opening the floodgates for other groups wishing to employ the right of political participation, the court supplied no limiting principle to contain this new right. *Id.* at D-23-27.

In *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), a federal district court followed *Evans I* and permanently enjoined a ballot initiative passed overwhelmingly by the voters of Cincinnati. The court attempted to limit the scope of the right of political participation by distinguishing between "independently identifiable groups" and mere "identifiable groups." 860 F. Supp. at 434 n.12. The court said that "the difference

between an 'independently identifiable group' and an 'identifiable group' is that where the factor identifying the group transcends the mere support for any given issue, the group is 'independently identifiable.' " *Id.* "On the other hand, a group whose sole identifying characteristic is that group's support for a single issue is merely an identifiable group." *Id.* Under this definition, most identifiable groups – such as the ones discussed in the examples above – are also independently identifiable groups.[4] Indeed, any generally applicable definition of independently identifiable group that is broad enough to include homosexuals and bisexuals almost certainly will include many other groups whose policy preferences have been placed beyond the ordinary political process by the federal and state constitutional rights of individuals.

Clearly, homosexuals do not have a constitutional right to be included as a protected class under anti-discrimination laws. *See Crawford v. Board of Educ.*, 458 U.S. 527, 542 (1982). The issue in this case is whether the Equal Protection Clause dictates the level at which issues affecting homosexuals (or any other identifiable group) must be decided. In effect, the court below held that all issues affecting identifiable groups must be decided by elected representatives, not by direct democracy or constitutional amendment. This unprecedented decision is a significant threat to the right of direct self-government

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[4] For example, many groups which support state-financing for parochial schools share a common religious tradition, dating back thousands of years, which transcends any particular issue. Similarly, many (perhaps most) pro-life groups, such as Lutherans For Life and organized groups of Roman Catholics, are composed of individuals who share characteristics which transcend the politics of abortion.

through citizen initiatives. It also threatens to invalidate many basic rights currently existing under state constitutions. Finally, the right of political participation is inconsistent with many provisions of the Bill of Rights and other provisions of the Federal Constitution, because many of these provisions, like Amendment 2, remove issues favored by identifiable groups from the ordinary political process.

In sum, the revolutionary and unprecedented right of political participation created by the Colorado Supreme Court in *Evans I* seriously threatens not only the right of popular democracy, but also many basic individual liberties guaranteed by provisions of federal law and state constitutions, and creates a tension between this new right and provisions of the Bill of Rights which courts would have to resolve. This erroneous decision has already been followed by one federal trial court, and has been cited in many other jurisdictions to chill attempts to enact initiatives similar to Amendment 2.[5]

Further review is clearly warranted to clarify this important area of equal protection doctrine.

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[5] According to an attorney representing the Lambda Legal Defense Fund, the court's decision in this case is "very important on a national level. It sends a message throughout the country that anti-gay measures endanger the democratic process. It also sends an important message that the majority cannot sweep away minority rights by popular vote." Michael Booth, *Gay Rights Gain New Momentum*, Denver Post, Oct. 12, 1994, at 11A. The same attorney noted that the opinions in *Evans* were being used to attack citizen initiatives in Oregon, Idaho, and Florida. *Id.*

CONCLUSION

The Colorado Supreme Court has misinterpreted several of this Court's equal protection decisions to create an unprecedented and revolutionary fundamental right of any and every "independently identifiable" interest group to have its regulatory agenda insulated against the countervailing interests of others. This new equal protection doctrine has cast a long shadow of uncertainty not only over the traditional right of democratic self-government, but also over the concept of constitutionalism – of representative government tempered by individual liberty. Clearly, the Equal Protection Clause does not provide protection for any and every special interest group against the political discouragement that necessarily arises when a political issue favored by the group is removed from the ordinary political process by a constitutional amendment. This case presents this Court with an ideal opportunity to clarify the true meaning of its decisions in *Hunter* and *James*.

For all of the foregoing reasons, *amici* urge the Court to grant the Petition and issue a Writ of Certiorari to the Supreme Court of the State of Colorado.

Respectfully submitted,

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